GURCHARAN SINGH KARNAL SINGH A

v.

MNINDER KAUR PIARA SINGH

HIGH COURT MALAYA, KUALA LUMPUR B
SURAYA OTHMAN J
[DECLARATION PETITION NO: S8-33-108-2009]
1 JUNE 2010

FAMILY LAW: *Divorce - Domicile - Recognition of divorce granted by court in United States of America to dissolve a Malaysian marriage - Whether petitioner domiciled in America at time of granting of divorce - Whether petitioner had abandoned Malaysian domicile - Presumption of domicile under Law Reform (Marriage & Divorce) Act 1976, s. 3(2) - Burden of establishing domicile on petitioner* C D

FAMILY LAW: *Divorce - Foreign divorce - Foreign decree of divorce to dissolve a Malaysian marriage - Common law principles applicable - Whether divorce granted by court of parties' domicile - Divorce granted by court in United States of America - Whether petitioner domiciled in America at time of granting of divorce - Burden of establishing domicile on petitioner* E

WORDS & PHRASES: *Domicile - Meaning of - Law Reform (Marriage & Divorce) Act 1976, s. 3(2)* F

The petitioner husband and respondent wife were married on 1 October 1988 at the Registry of Civil Marriages in Seremban. The parties then cohabited in Malaysia and two children were born to them in 1991 and 1992. The petitioner claimed that the respondent and the children had deserted him on 5 December G 2007 and as a result he suffered psychological distress. As a result, the petitioner resigned from his job and went to the United States of America ('USA') to stay with his relatives. The petitioner claimed to have been ordinarily resident in the USA since 29 January 2008. There was one pending court proceeding in H Malaysia filed by the respondent on 28 March 2008 for guardianship, custody, care and control of the children and also for maintenance. The court in that suit had granted an ad-interim injunction on 23 April 2008 restraining the petitioner from disposing of the matrimonial properties. The petitioner then filed I proceedings in the Superior Court of the State of Arizona on 15 May 2008 for dissolution of the said marriage. The petitioner claimed that the court in the State of Arizona took jurisdiction on

A the basis that the petitioner was a permanent resident of the USA having resided in the State of Arizona for at least 90 days prior to the filing of the said petition. On 3 November 2008 the Superior Court of Arizona granted a decree of dissolution of the said marriage. Subsequently, the petitioner filed this application for
B a declaration under s. 107 of the Law Reform (Marriage & Divorce) Act 1976 (Act 164) ("LRA 1976") that the decree of dissolution of marriage obtained by him on 3 November 2008 in the Superior Court of Arizona was valid. The issue to be decided was whether the decree of dissolution of marriage granted by the
C Superior Court of Arizona should be recognized as valid for the purposes of the law of Malaysia.

Held (dismissing the petition with costs):

D **(1)** Malaysia does not have any specific section in LRA 1976 or any legislation on recognition of foreign divorce. Therefore, the Malaysian courts should refer to the common law position. The law applicable on this issue is found in s. 3 of the Civil Law Act 1956. By applying the relevant common law principle,
E Malaysian courts should only recognise a foreign decree of divorce to dissolve a Malaysian marriage if it was granted by the court of the parties' domicile. (paras 25 & 28)

(2) The petitioner was at all material times a citizen of Malaysia. Under s. 3(2) of LRA 1976, the petitioner was deemed to be
F domiciled in Malaysia, and the burden was on him to rebut this presumption of law. (paras 29 & 30)

(3) Domicile means a place of residence or ordinary habitation, a house or home, the place where one has his permanent
G residence, to which, if absent, he has the intention of returning. In Malaysia, the law on domicile is similar to common law. Any person may acquire a domicile of choice provided he is an adult. When a domicile of choice is obtained, the domicile of origin would be held in abeyance
H until abandonment of the domicile of choice. (paras 31 & 32)

(4) Clear evidence is required to establish a change of domicile. In particular, to displace the domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere
I balance of probabilities. The oath of a person whose domicile is in question as to his intention to change his domicile is not

conclusive. The question for the court is whether upon a review of all the circumstances it gives credit to his evidence. (paras 34 & 35)

(5) There was no clear evidence in support of the fact that the petitioner had abandoned his Malaysian domicile. The 90 days residence in the USA was not sufficient to constitute that the petitioner has acquired a domicile of choice in the USA since the period was too short a stay to show his intention to make the USA his permanent residence. (para 36)

(6) A Malaysian court in applying the common law position would only recognise a foreign decree of divorce (which purports to dissolve a Malaysian marriage) if it was granted by the court of the parties' domicile or if was granted by a foreign court which assumed jurisdiction on the same grounds as the Malaysian court would have assumed jurisdiction. (para 41)

Case(s) referred to:
Armitage v. Att Gen [1906] P135 and Travers v. Holy [1953] P246 ***(refd)***
Bater v. Bater [1906] P 209 CA ***(refd)***
D v. D (Nature of Recognition of Oversea Divorce) [2006] FLR ***(refd)***
Henderson v. Henderson [1965] 1 All ER 179 ***(refd)***
Indyka v. Indyka [1969] AC 33 ***(refd)***
James Sloan v. Sarala Dew Sloan [2010] 4 CLJ 483 HC ***(refd)***
Joseph Wong Phui Lan v. Yeoh Loon Goit [1978] 1 LNS 76 ***(refd)***
Le Mesurier v. Le Mesurier [1895] AC 517 ***(refd)***
Melvin Lee Campbell v. Amy Anak Edward Sumek [1988] 1 LNS 19 ***(refd)***
Re Bhagwan Singh, dec'd [1964] 1 LNS 164 ***(refd)***
Siah Teong Woei v. Janet Traynor [2010] 3 CLJ 361 HC ***(refd)***
Sivarajan v. Sivarajan [1972] 1 LNS 137 ***(refd)***
Travers v. Holly and Holey [1953] 2 All ER 794 ***(refd)***
William Tan Guan Hock v. Khor Chai Heah [1990] 1 CLJ 895; [1990] 1 CLJ (Rep) 308 SC ***(refd)***

Legislation referred to:
Age of Majority Act 1971, s. 2
Civil Law Act 1956, s. 3
Law Reform (Marriage & Divorce) Act 1976, ss. 3(2), 47, 48(1), 49, 76, 77, 107

Matrimonial Causes Act 1937 [UK], s. 13

A *For the petitioner/husband - SY Chew (Siew Choon Jern with her); M/s Douglas Yee & Assoc*
For the respondent/wife - Balwant Singh Sidhu; M/s Balwant Singh Sidhu & Co

B *Reported by Amutha Suppayah*

JUDGMENT

C **Suraya Othman J:**

Introduction

[1] This is an application under s. 107 of the Law Reform (Marriage & Divorce) Act 1976 (Act 164) ("LRA 1976") by the
D petitioner husband by way of petition in encl. (1) praying for the following orders:

a) that this court may declare that the decree of dissolution of marriage obtained by the petitioner husband on 3 November 2008 in the Superior Court of Arizona at Phoenix in the
E United States Of America ("USA") is valid;

b) that the respondent wife may be condemned in the costs of this suit; and

F c) any other relief deemed suitable by the honourable court.

Facts And Background

[2] The petitioner husband and respondent wife were married on 1 October 1988 at the Registry of Civil Marriages in Seremban,
G Negeri Sembilan Malaysia. After the marriage, the parties had cohabited in Malaysia and last cohabited at No. 11, Jalan PJU 3/26, Sunway Damansara, 47810 Petaling Jaya Selangor.

There are two children of the marriage; Gurpreet Singh Khera
H born on 17 April 1991 and Harpreet Kaur Khera born on 28 December 1992.

The petitioner claims that the respondent and the children had deserted him on 5 December 2007 and as a result he suffered
I emotional and psychological distress. Thereafter he had to resign from his job as a consultant clinical oncologist at the Damansara Specialist Hospital on or around 28 January 2008 since he could not cope with his job due to his marital problems.

[3] The petitioner then claims that his family members including siblings, nephews and nieces in United States of America (USA) realized his distress and offered to help him and they invited him to come to stay in the USA. He claims that he had originally planned to relocate to the USA for the children's education and he had made preparations for this plan as far back as 1988. He then claims he decided to go to the USA to join his family members as he desperately needed their emotional and mental support to survive as well as to get treatment from a psychiatrist there.

[4] The petitioner has Malaysian citizenship and says that he has been ordinarily resident in the USA since 29 January 2008. There is one proceeding in Malaysia previous to the proceeding herein between the parties. The proceeding is under Originating Summons No. S8-24-30-2008 filed by the respondent on 28 March 2008 for guardianship, custody, care and control of the children and also for the respondent's and the children's maintenance. The court in this suit has granted an ad-interim injunction on 23 April 2008 restraining the petitioner from disposing of the matrimonial properties. This suit is still pending.

[5] There is one proceeding in the USA previous to the proceeding herein between the parties, ie, in the Superior Court of the State of Arizona, Petition for Dissolution of Marriage No. FC2008-003478. This suit is filed by the petitioner in Phoenix in the State of Arizona, USA on 15 May 2008 for dissolution of the said marriage. (exh. GUR5 of the petition).

[6] The petitioner claims that the said court in the State of Arizona took jurisdiction on the basis that the petitioner is a permanent resident of the USA having resided in the State of Arizona for at least 90 days prior to the filing of the said petition for dissolution of marriage. (exh. GUR6, GUR7 and GUR8 of the petition).

[7] On 3 November 2008 the Superior Court of Arizona in the State of Arizona in the USA at Phoenix granted a decree of dissolution of the said marriage solemnized in Malaysia on 10 October 1988. (exh. GUR11 of the petition).

Subsequently, the petitioner filed this application before this court for a declaration under s. 107 LRA 1976 that the decree of dissolution of marriage obtained by him on 3 November 2008 in the Superior Court of Arizona at Phoenix in USA is valid.

A **Submission Of Counsels**

[8] Ms. S. Y Chew, counsel for the petitioner, argued that the petitioner left Malaysia to settle down in the USA and he therefore had acquired a domicile of choice in the USA. On this
B basis learned counsel submitted that under English common law, recognition is given to foreign divorces when there is a connecting factor between the parties and the foreign country such as domicile. Ms S Y Chew further submitted that there were changes to this general approach and the English court gave recognition to
C a foreign decree using the *Travers v. Holly and Holey* [1953] 2 All ER 794 approach. Under this approach foreign decree is recognized as valid if it was governed by principles of validity which the English court follow, for example under the residential requirement which enable a wife to obtain a divorce in a country
D in which the husband was not domicile.

[9] Ms. S. Y. Chew further argued that sufficient notice of the petitioner's petition was given to the respondent; she was served the divorce papers and given an opportunity to appear at the
E hearing in the USA court but failed to do so. Thus there was no substantial injustice in the way the petitioner obtained his divorce decree in the USA court.

[10] Ms. S. Y. Chew also submitted that our law on domicile follows the English common law principles, that is, a woman
F acquires the domicile of her husband immediately upon marriage and during the subsistence of the marriage her domicile is that of her husband's. In this light, Ms. S. Y. Chew referred to the case of *Bater v. Bater* [1906] P 209 CA for support.

G **[11]** Ms. S. Y. Chew also referred to the case of *D v. D (Nature of Recognition of Oversea Divorce)* [2006] FLR which reiterates the long-standing principle that a divorce dissolves marital status, but not the solemnization of a marriage.

H **[12]** In replying to the above submission, Mr Balwant Singh Sidhu, counsel for the respondent, submitted that only the Malaysian court has jurisdiction and power to dissolve this Malaysian marriage as stated under s. 48(1) of LRA 1976.

[13] Mr Balwant Singh Sidhu also argued that under s. 3(2) of
I LRA 1976 there exist a presumption of law that the petitioner being a Malaysian citizen is deemed to be domiciled in Malaysia.

The petitioner in this case has failed to rebut that presumption since he has not proven that he has abandoned his Malaysian domicile for that of the USA since there is no evidence of any intention on his part to remain in the USA permanently. In this regard, Mr Balwant Singh Sidhu submitted the following cases; *Re Bhagwan Singh, dec'd* [1964] 1 LNS 164; *Joseph Wong Phui Lan v. Yeoh Loon Goit* [1978] 1 LNS 76, *Melvin Lee Campbell v. Amy Anak Edward Sumek* [1988] 1 LNS 19 and *William Tan Guan Hock v. Khor Chai Heah* [1990] 1 CLJ 895; [1990] 1 CLJ (Rep) 308 in support of his contention.

[14] Mr Balwant Singh Sidhu further submitted that as Malaysia is not a signatory to the Hague Convention for the Recognition of Foreign Divorce, the Malaysian courts are free to exercise its discretion whether to recognize or not such purported dissolutions of Malaysian marriages.

[15] Mr Balwant Singh Sidhu further argued that a Malaysian court must apply the common law position and should only recognize a foreign decree of divorce if it was granted by the court of the parties' domicile, or, if it was granted by a foreign court which assumed jurisdiction on the same grounds as the Malaysian court would assume jurisdiction. On this point, Mr Balwant Singh Sidhu referred to the following cases of *Le Mesurier v. Le Mesurier* [1895] AC 517, *Armitage v. Att. Gen.* [1906] P135 and *Travers v. Holy* [1953] P246 to support his contention.

[16] Mr Balwant Singh Sidhu also submitted that recognition of a foreign divorce obtained by the husband would work great injustice to the respondent and it is only fair and just that all issues should be determined by the Malaysian court.

Findings Of The Court

[17] This court has considered the written submissions and the affidavits filed by both parties in this matter.

Primary Issue

[18] Having regard to the facts of this case and the above submissions, the primary issue to be decided here is whether the decree of dissolution of the said marriage dated 3 November 2008 granted by the Superior Court of Arizona in the State of Arizona at Phoenix in the USA should or should not be recognized as valid for the purposes of the law of Malaysia.

A

The Law

Jurisdiction Of Malaysian Courts

[19] The law applicable for this court to dissolve a marriage is found in ss. 48 and 49 LRA 1976. Section 48(1) of LRA 1976, authorizes the court to grant a decree of divorce in such circumstances. Section 48 provides:

48. Extent of power to grant relief

(a) where the marriage of the parties has been registered or is deemed to be registered under this Act; or

(b) where the marriage between the parties was contracted under a law providing that, or in contemplation of which, marriage is monogamous; and

(c) where the domicile of the parties to the marriage at the time when the petition is presented in Malaysia.

[20] The marriage of the parties had been registered under the LRA 1976 on 1 October 1988 in Seremban, Negeri Sembilan, Malaysia. The certificate of marriage is annexed with the petition. The parties have at all material times been, and continue to be, citizens of Malaysia.

[21] Section 49 provides additional powers to the court to grant a decree of divorce to a wife in certain circumstances. Section 49 provides:

49. Additional jurisdiction in proceedings by a wife.

(1) Notwithstanding anything to the contrary in paragraph 48(1)(c), the court shall have jurisdiction to entertain proceedings by a wife under this Part, *although the husband is not domiciled or resident in Malaysia if*:

(a) *the wife has been deserted by the husband,* or the husband has been deported from Malaysia under any law for the time being in force relating to the deportation of persons, and the husband was before the desertion or deportation domiciled in Malaysia; or

(b) *the wife is resident in Malaysia and has been ordinarily resident in Malaysia for a period of two years immediately preceding the commencement of the proceedings.*

(2) In any proceedings in which the High Court has jurisdiction by virtue of this section, the issues shall be determined in accordance with the law which would be applicable thereto if the parties were domiciled or resident in Malaysia.

(3) In this section references to deportation from Malaysia shall be construed as including banishment or expulsion under any written law.

[22] Therefore s. 49 of out Act gives this court additional jurisdiction to dissolve this marriage as the respondent wife has been deserted by the petitioner husband, and she has resided here in Malaysia for more than two years – in fact throughout the marriage.

LRA 1976 (Registration Of Foreign Decree Of Dissolution)

[23] The law applicable for this court to declare a foreign decree as valid is found in s. 107 of LRA 1976. Section 107 provides:

107. Maintenance of register of divorces and annulments.

(1) ...

(2) ...

(3) *Where a marriage which is solemnized in Malaysia is dissolved* or annulled *by a decree of a court of competent jurisdiction outside Malaysia,* either of the parties may apply to the Registrar-General for the registration of such decree and *the Registrar-General, on being satisfied that the decree is one which should be recognized as valid for the purposes of the law of Malaysia, shall register that decree.*

[24] It is an established practice that Registrar General will require a party to obtain a court order declaring the foreign decree as valid before the Registrar General will register the foreign decree. In this premise, Malaysian courts have full discretion and power whether to recognize or not recognize the foreign decree concerned.

Section 3 Of The Civil Law Act 1956, (Act 67). (Common Law Position)

[25] As far as recognition is concerned, it must be noted that Malaysia does not have any specific section in LRA 1976 or any legislation on recognition of foreign divorce. Therefore the

Malaysian Court should refer to the common law position. The law applicable on this issue is found in s. 3 of the Civil Law Act 1956 which states:

> **3 Application of UK common law, rules of equity and certain statutes**
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> 3(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall:
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> (a) in West Malaysia, or any part thereof, apply the common law of England and the rules of equity as administered in England on 7th of April 1956.

It is also important to note that s. 47 of LRA 1976 is relevant on this issue. Section 47 of LRA 1976 provides:

> **47. Principles of law to be applied.**
>
> Subject to the provisions contained in this Part, the court shall in all suits and proceedings hereunder act and give relief on principles in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings.

[26] In deciding whether to declare the decree of dissolution of a marriage dated 3 November 2008 as valid or invalid, this court is guided by the case of *Le Mesurier v. Le Mesurier* [1895-1899] All ER 794, where Lord Watson delivering the decision of the Board held that according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve a marriage. In that case the court stated:

> Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve the marriage. They concur without reservation, in the view expressed by Lord Penzance in *Wilson v. Wilson* (7), which were obviously meant to refer, not to question arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce (see LR 2 P & D at p. 442):

> It is the strong inclination of my own opinion *that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties on all cases referring their matrimonial differences to the courts of the country in which they are domicile.* Different communities have different views and laws respecting moral obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be a man and wife in one country, and stranger in another.

Based on the decision aforesaid, the law on the recognition of foreign decrees of divorce by the English court is that a divorce granted by a court of another country would not be recognized as valid in England unless the parties were domiciled in that country.

[27] Here, this court would like to refer to the case of *Sivarajan v. Sivarajan* [1972] 1 LNS 137. In this case the Singapore Court refused to recognize a divorce obtained from an Indian Court on the basis that the court found that the parties were domiciled in Singapore at the time the divorce was granted by the Indian Court. Winslow J stated that:

> It is quite clear that if the appellant had merely been a resident here who had obtained a divorce in India on the basis of his being domiciled there, the court in Singapore would recognize such a divorce. That, however, is not the position in this case. The Court of the District Munsif, Tellichery, Kerala State, did not purport to exercise jurisdiction on the ground of his being domiciled there. The court clothed itself with jurisdiction because the place where the marriage was celebrated lay within its jurisdiction. It is facts found by the magistrate that the appellant at the time he obtained his divorce in India was in fact domiciled in Singapore. The court in Singapore therefore cannot recognize such a divorce.

[28] This court is of the view that by applying the relevant common law principle, Malaysian Courts should only recognize a foreign decree of divorce to dissolve a Malaysian marriage if it was granted by the court of the parties' domicile.

A *Presumption Of Law*

[29] In this present case, the petitioner has at all material times been and continues to be a citizen of Malaysia. Section 3(2) of LRA 1976 is pertinent on this point. Section 3(2) states:

B **3. Application.**

(1) ...

(2) For purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proven, to be domicile in Malaysia.

C

[30] By applying the aforesaid section, the petitioner is therefore deemed to be domiciled in Malaysia, and the burden is on him to rebut the above presumption of law.

D *Domicile*

[31] Referring to the Oxford English Dictionary, domicile means a place of residence or ordinary habitation, a house or home, the place where one has his permanent residence, to which, if absent, he has the intention of returning. In the light of this case, it is pertinent for this court to discuss on domicile of choice as the petitioner has stated that his intention is to retain USA as the domicile of his choice.

E

F **[32]** In Malaysia, the law on domicile is similar to Common law. As regard to a domicile of choice, any person may acquire a domicile of choice provided he is an adult, that is to say, 18 years old according to s. 2 of the Age of Majority Act 1971. When a domicile of choice is obtained, the domicile of origin would be held in abeyance until abandonment of the domicile of choice.

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[33] In the present case, it is undisputed that the domicile of origin of the petitioner in this case is Malaysia. The question before this court is whether from the facts, the petitioner has acquired a domicile of choice in the USA.

H

[34] Clear evidence is required to establish a change of domicile. In particular, to displace the domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities. This principle was established by Sir Jocelyn Simon P in the case of *Henderson v. Henderson* [1965] 1 All ER 179:

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> In order to help resolve such difficulties the law has evolved further rules. First, clear evidence is required to establish a change of domicile. In particular, to displace the domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities.

[35] The petitioner has stated in his affidavit that he left Malaysia to settle down in the USA and therefore he had acquired a domicile of choice in the USA. Case authorities have held that the oath of a person whose domicile is in question as to his intention to change his domicile is not conclusive. The question for this court is whether upon a review of all the circumstances it gives credit to his evidence. In this regard, the court in the case of *Joseph Wong Phui Lun v. Yeoh Loon Goit* [1978] 1 LNS 76 held that:

> The oath of the person whose domicile is in question as to his intention to change his domicile is not conclusive. The question for the court is whether upon a review of all the circumstances it gives credit to his evidence.

[36] Reverting back to this present case, this court is unable to find any clear evidence in support of the fact that the petitioner has abandoned his Malaysian domicile. It is this court's finding that the petitioner in his affidavit has not confirmed or affirmed that he has given up his Malaysian citizenship, or that he intends to reside permanently in the USA, or that he has secured investment, employment or a residence there. Upon a review of all the circumstances, it is clear that the petitioner has failed to rebut the presumption that he continues to retain his Malaysian domicile or that he has displaced his domicile of origin (Malaysia) in favour of his domicile of choice (USA).

[37] It is not in argument that the Superior Court of Arizona in the State of Arizona in the USA at Phoenix had granted a decree of dissolution of the said marriage based on its jurisdiction on the petitioner having resided in the USA for a mere 90 days before the filing of the petition of divorce and not on the basis that the petitioner is domicile in the USA. Therefore, the 90 days residence to my mind is not sufficient to constitute that the petitioner has acquired a domicile of choice in the USA since the period is too short a stay to show his intention to make the USA his permanent residence, where if he is absent, he has every intention of returning. (Refer to this court's decision in *James Sloan v. Sarala Dew Sloan* [2010] 4 CLJ 483 on the issue of domicile of choice).

[38] With regard to the petitioner husband's argument that based on *Travers v. Holley's (supra)* approach, the foreign decree is recognized as valid if it was governed by the principles of validity which the English courts follow for example under the residential requirement which enabled a wife to obtain a divorce in a country which the husband was not domiciled, this court is unable to accept the petitioner husband's contention that this approach should be followed and therefore the decree obtained by the petitioner should be recognized as valid.

[39] In the case of *Travers v. Holley*, the court decided that a decree of divorce given in the Court of New South Wales against a husband who had acquired a domicile of choice in New South Wales should be recognized in the English courts. The basis for the recognition was the New South Wales Matrimonial causes Act 1899 which gave to a wife who had been domiciled in New South Wales for up to three (3) years, the right to petition for divorce if her husband had without just cause wilfully deserted her, a provision which was in substance similar to the English law under s. 13 of the Matrimonial Causes Act 1937. In short the principle that was established by this case is that the court would recognize a jurisdiction which they themselves claimed. In another word, a foreign decree of divorce should be recognized if it was granted by a foreign court which assumed jurisdiction on the same ground as the Malaysian court would have assumed jurisdiction. It is this court finding that the Malaysian courts in this case do not assume jurisdiction to grant a decree of divorce on the basis of residence of a mere 90 days. Therefore this court is of the opinion that it cannot be said that the USA court acted on the same principles that the Malaysian court or the English court for that matter would have acted or grant relief. (Refer to this court's decision in *Siah Teong Woei v. Janet Traynor* [2010] 3 CLJ 361 on this point).

[40] Further, if I may add, even if the residential requirement is followed, this court will still have to take into account, among other requirements, the length and quality of the residence to determine whether a real and substantial connection is shown between the petitioner and the country exercising jurisdiction and in this case the period of a mere 90 days, without more, is too short a stay to show any real and substantial connection. (Refer to the decision of The House of Lords in *Indyka v. Indyka* [1969] AC 33).

[41] It must be noted, a Malaysian court in applying the Common law position would only recognise a foreign decree of divorce (which purports to dissolve a Malaysian marriage) if it was granted by the court of the parties' domicile or if was granted by a foreign court which assumed jurisdiction on the same grounds as the Malaysian court would have assumed jurisdiction. A B

[42] In our case, the parties were at all material times domiciled in Malaysia. The basis for this court to assume jurisdiction to dissolve a marriage is as contained in ss. 48 and 49 of the LRA 1976. C

[43] The Malaysian court will assume jurisdiction if the marriage was registered in Malaysia and the parties are domiciled in Malaysia at the time of the commencement of the proceedings (s. 48) or where the wife has been resident here in Malaysia for at least two years immediately preceding the commencement of filing for divorce in the case where the husband has deserted her (s. 49). D

[44] In light of ss. 48 and 49 of LRA 1976, the Malaysian court will have jurisdiction to dissolve this Malaysian marriage, where parties are of Malaysian domicile or in any event, where the wife continues to be resident here in Malaysia after the husband has deserted her. Therefore since the parties are both domiciled in Malaysia, this court has the jurisdiction and power to dissolve the marriage. E F

[45] As regard to the issue of whether there is substantial injustice in the way the petitioner obtained his divorce decree in the USA court, this could would respectfully agree with the views expressed by Mr Balwant Singh Sidhu that if the foreign decree of divorce is recognized, the respondent will not be able to file proceedings in Malaysia to dissolve her marriage. The most drastic consequence would then be that the Malaysian court would not have jurisdiction to order the division of property or assets acquired during the subsistence of the marriage between two Malaysians. This injustice is compounded by the fact that all these properties and assets were acquired in Malaysia, when both parties were in Malaysia. This is because s. 76 of LRA 1976 only gives this court jurisdiction and power to order the division of assets acquired during the marriage, when granting of such decree of divorce. G H I

[46] Apart from that, if the foreign decree is recognized and is declared as valid, the Malaysian court would not be able to adjudicate upon any ancillary reliefs filed by the respondent wife in view of ss. 76 and 77 of LRA 1976. This would not be just and equitable since both the respondent wife and the children are Malaysian citizens living in Malaysia and continues to reside in Malaysia.

Conclusion

[47] To sum it up, for all the above reasons, this court does not recognize the decree of dissolution of marriage dated 3 November 2008 granted by the Superior Court of Arizona in the State of Arizona at Phoenix in the USA, and consequently decline registration of the same under s. 107 of the LRA 1976.

[48] In the result, this court dismisses the petitioner husband's petition with costs.

Petition dismissed with costs.